RESTRAINT OF THE PERSON UNDER VOID STATUTES.—An unconstitutional statute or ordinance, viewed in the light of strict principle, is a complete nullity and all proceedings under it are *coram non judice*. *Sumner* v. *Beeler* (1875) 50 Ind. 341. A court, therefore, which acts under such statute or ordinance is without jurisdiction; all process issued by it is void and an officer acting under such process is without protection. *Campbell* v. *Sherman* (1874) 35 Wis. 103; *Sumner* v. *Beeler*, supra; *State* v. *Hunter* (1890) 106 N. C. 796; *Barling* v. *West* (1871) 29 Wis. 307. The application of these principles is met on one point, however, by the well established rule of judicial immunity. From very early times, due to the weightiest reasons of public policy, a judge acting within his jurisdiction is not liable to a civil action whatever his motive, *Floyd* v. *Barker* (1608) 12 Coke 25; *Woodruff* v. *Stewart* (1879) 63 Ala. 206; *Yates* v. *Lansing* (1810) 5 Johns. 283, although he is liable when he acts without color of jurisdiction. *Stephens* v. *Wilson* (1903) 115 Ky. 27. This doctrine of immunity has been brought to cover cases where a judge of a higher court has jurisdiction of the person and of the subject-matter, the latter being defined as the power to adjudge concerning the general question involved and not dependent upon the facts of any particular case, *Hunt* v. *Hunt* (1878) 72 N. Y. 217, even though he acts in excess of that jurisdiction, *Lange* v. *Benedict* (1878) 73 N. Y. 12, and whatever his motive. *Bradley* v. *Fisher* (1871) 13 Wall. 335. The modern trend has been to extend this immunity to judges of inferior courts as well, *Grove* v. *Van Duyn* (1882) 44 N. J. L. 654; *Pratt* v. *Gardner* (Mass. 1848) 2 Cush. 63; *Austin* v. *Vrooman* (1891) 128 N. Y. 229, but some jurisdictions restrict this to cases where they act in good faith. *Robertson* v. *Parker* (1898) 99 Wis. 652; and see *Truesdell* v. *Combs* (1877) 33 Ohio St. 186; *Vanderpool* v. *State* (1879) 34 Ark. 174.

These principles, logically applied, in no way interfere with the rule that an unconstitutional enactment is a nullity. The conflict is produced by an extension of the doctrine of judicial immunity. Where an alleged violation of a statute or ordinance is brought before a judicial officer, having jurisdiction of offenses under such enactments, it is his judicial duty to determine whether there is a cause of action. If he refuses to act he is liable and if he acts, and the statute or ordinance is invalid, he is also liable, on strict principle. He is, then, between two fires. Accordingly, from the same considerations of public policy, the rule has been widely followed which exempts a judge of a higher court from liability when acting under a de facto statute or ordinance, and this rule has been extended as before to embrace judges of inferior courts, *Trammell* v. *Russellville* (1879) 34 Ark. 105; *Hofschulte* v. *Doe* (1897) 78 Fed. 436, especially where they act in good faith. *Brooks* v. *Mangan* (1891) 86 Mich. 576. Where a judicial officer acts under a void statute or ordinance the courts adopt a pure fiction, holding that, if he has jurisdiction of offenses covered by a group of statutes or ordinances of which the particular void statute or ordinance is one, then he has jurisdiction of the subject-matter and hence can act in excess of his jurisdiction without liability. This cloaking of a rule of public policy by fictitious theory is illustrated by a dictum in *Bradley* v. *Fisher*, supra, "If a judge of the criminal court having jurisdiction over offenses committed in a certain

district holds a particular act to be a public offense which the law does not make an offense, and proceeds to arrest, try and sentence a person charged with such act, no liability for such acts attaches to the judge, though he exceeds his jurisdiction, for these are particulars for his consideration whenever his general jurisdiction over the subject-matter is invoked." This dictum has, apparently, been the foundation of the rule above-mentioned. *Brooks* v. *Mangan*, and *Hofschulte* v. *Doe*, supra.

A recent case, *Bohri* v. *Barnett* (Wis. 1906) 144 Fed. 389, adopting this dictum and exempting a justice of the peace from liability for false imprisonment under a void ordinance, illustrates an interesting development in this connection. The court extended the exemption to a ministerial officer acting under process issued by the justice. The result was reached on the ground that the process was fair on its face and "proceeding from a court having authority to issue process in cases for the violation of ordinances." This conclusion is inevitable if the forced explanation of the judge's exemption, i. e. that action under a void law is mere excess of jurisdiction, is to be consistently upheld, *Savacool* v. *Boughton* (1830) 5 Wend. 172, and it has already been reached by most of the courts which grant judicial exemption in such cases. *Hofschulte* v. *Doe*, supra; *Henke* v. *McCord* (1880) 55 Iowa 378. The result of thus shielding a rule of policy by false theory is, in effect, to make process issued under a void statute valid and a complete protection to the officer acting under it. Although this result seems good practically, the danger of adopting generally such a use of fiction to cover policy is too apparent.